In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1572

APACHE COUNTY; MARGARET LEE, ARTHUR N. LEE, LARRY STRADLING, and TOM SHIRLEY, as Clerk and Members of the Apache County Board of Supervisors; MARGARET LEE, ARTHUR N. LEE, LARRY STRADLING and JAMES A. MCDONALD, individually,

Appellants,

vs.

UNITED STATES OF AMERICA; EDWARD LEVI, as Attorney General of the United States; RAUL CASTRO, as Governor of Arizona; BRUCE BABBITT, as Attorney General of Arizona; VIRGIE HEAP, as Apache County Recorder; LAVINE M. PORTER and FLORENCE PAISANO, as Justice of the Peace in Apache County; LESLIE E. GOODLUCK, KENNETH CHEE, STEVEN ASHLEY, SR., STANLEY E. ASHLEY and ANDERSON YAZZIE,

Appellees.

On Appeal from the United States Three Judge District Court for The District of Arizona

Jurisdictional Statement

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Jurisdictional Statement

The appellants, pursuant to United States Supreme Court rules 13(2) and 15, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the granting of the plaintiffs' permanent injunction and the denial of the defendants' requested permanent injunction, and should exercise such jurisdiction in this case.

OPINION BELOW

The three judge statutory district court for the District of Arizona filed its Opinion in this case on September 16, 1975. On September 25, 1975 appellants filed a timely Motion for Rehearing and on February 19, 1976 the Motion for Rehearing was denied and a Final Order issued implementing the earlier Opinion of the court. Neither the Opinion nor the subsequent Orders are yet officially or unofficially reported. The Opinion, Order denying Rehearing and Order Implementing the Opinion are attached hereto as Appendix A. No Findings of Fact nor Conclusions of Law were made separate from those expressed in the Opinion.

JURISDICTION

This appeal arises out of two actions filed on separate dates in the United States District Court for the District of Arizona. On October 15, 1973 certain Navajo Reservation Indians instituted action against Apache County and certain officers thereof, both individually and as public officers, claiming violation of civil and constitutional rights because of alleged malapportionment of Apache County, Arizona supervisorial districts. That action was brought pursuant to 28 U.S.C. § 1343. Shortly thereafter the defendants below added additional parties and counterclaimed contending that certain federal and state statutes allowing Navajo Reservation Indians to vote in Apache County elections were unconstitutional and that their enforcement, operation and execution should be enjoined. Defendants requested that a three judge district court be convened pursuant to 28 U.S.C. §§ 2281 and 2282 and thereafter the statutory court was convened.

Then on January 23, 1974 the United States of America filed a second suit in United States District Court of Arizona against essentially the same defendants alleging similar violations of the Indian rights pursuant to 42 U.S.C. §§ 1971(d), 1973 j (f) and 28 U.S.C. § 1345. The statutory court was also appropriate in this action pursuant to 42 U.S.C. § 1971(g) and this case was ordered consolidated with the earlier lawsuit. The defendants answered the second complaint asserting the same defense as raised by way of the counterclaim in the first action.

These consolidated actions were decided on cross motions for summary judgment wherein the Plaintiffs' motions for injunctive relief were granted and the Defendants' motion for injunctive relief was denied. The court entered its Opinion on September 16, 1975 and subsequently on February 19, 1976 entered Orders denying the Motion for Rehearing and Implementing the Opinion. It is from the Opinion and Orders that appeal is taken. The Notice of Appeal to this court was filed in the United States District Court for the District of Arizona on the 4th day of March, 1976.

The appellants herein sought to have declared unconstitutional and enjoin the enforcement, operation or execution of 8 U.S.C. § 1401(a) (2) and A.R.S. § 16-101 and implementing statutes which had the effect of allowing the Navajo Reservation Indians to vote in Apache County elections and be counted for apportionment of supervisorial districts. For this reason a statutory court was properly convened under 28 U.S.C. §§ 2281 and 2282. Therefore direct appeal to the United States Supreme Court is proper pursuant to 28 U.S.C. § 1253. In addition, the action by the United States of America seeking to require reapportionment of the Apache County supervisorial districts and enjoin alleged violations of Navajo Reservation Indian rights was grounds for convening a statutory court and therefore direct appeal to the United States Supreme Court pursuant to 42 U.S.C. § 1971(g).

The Arizona and United States statutes cited above, the validity of which is challenged, are set forth verbatim in Appendix C.

QUESTIONS PRESENTED

The lower court held that Navajo Tribal Indians are entitled to vote in Apache County elections because they were found to be citizens of the United States and of Arizona under 8 U.S.C. § 1401(a) (2) and because they were found to qualify as voters under A.R.S. § 16-101. Therefore the court concluded that the three supervisorial districts in Apache County should be reapportioned under the one-man, one-vote rule according to agreed population figures. This will place at least two of the three supervisorial districts entirely within the Navajo Reservation and permit Tribal Indians to completely control the taxing and governmental power of Apache County from which taxes and powers those Tribal Indians are essentially immune.

The substantial questions presented by this appeal are whether 8 U.S.C. § 1401(a) (2) and/or A.R.S. § 16-101 are unconstitutional and whether their enforcement, operation and execution should be enjoined in order to prevent Navajo Tribal Indians from voting in Apache County elections or being counted as part of the population in the apportionment of county supervisorial districts upon *any* of the following grounds:

I. The 14th Amendment to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States *and subject to the jurisdiction thereof are citizens* of the United States and of the State wherein they reside . . ."
>
> "Section 2. Representatives shall be apportioned among the several States according to their respective

> number, counting the whole number of persons in each State, *excluding Indians not taxed*". (emphasis supplied).

8 U.S.C. § 1401(a) (2) is an attempt to confer citizenship upon Tribal Indians contrary to the foregoing sections of the 14th Amendment as interpreted by the United States Supreme Court in *Elk v. Wilkins,* 112 U.S. 94 (1884).

II. Navajo Tribal Indians are not residents of Arizona by virtue of the Arizona Enabling Act, the Navajo Treaty of 1868 and the court decreed jurisdictional limitations of state power over Navajo Tribal Indians and their Reservation.

III. Congress, our highest federal and state courts, and the Navajo Treaty of 1868 have consistently provided that Navajo Tribal Indians owe no allegiance to the State of Arizona and that such Indians are immune from all significant state and local laws and taxes. To permit Tribal Indians to participate in and to control a government to which they owe no allegiance and to which government's taxes and laws they are essentially immune violates the non-Indian appellants' constitutional rights to due process of law and equal protection of law under the 5th and 14th Amendments to the United States Constitution.

IV. If Navajo Tribal Indians are permitted to vote in Apache County elections and control the government of that county, they will thereby impose upon the appellants and all other non-Indian citizens of Apache County "punishment, pains, penalties, taxes, licenses and exactions of every kind", 42 U.S.C. § 1981, to which the Navajos themselves are not subject. This will violate appellants' civil rights provided for in 42 U.S.C. § 1981.

V. Navajo Tribal Indians cannot, under the 14th and 15th Amendments, vote in Apache County elections when

the voting laws of Arizona legally have no application to Indians on the Reservation, and when such election laws would, in any event, be criminally and civilly unenforceable against Tribal Indians.

STATEMENT OF THE CASE

Apache County, Arizona is a long, narrow county. A portion of the Navajo Reservation comprises the Northern half of the county. The Reservation population is almost entirely Navajo Tribal Indians; these Tribal Indians constitute three-fourths of the population of Apache County. The remaining 25% of the population is primarily Negros, Mexicans and Anglos.

The Navajo Tribal Indians have not been assimilated into the political process of the State of Arizona because that assimilation process requires the consent of the Tribe under 25 U.S.C. §§ 1321 and 1322. Therefore, by virtue of many court rulings, various congressional acts, the Navajo Treaty of 1868 and the Arizona Enabling Act, Arizona and its political subdivisions such as Apache County have no power to tax the property of the Tribal Indians on the Reservation, have no power to impose state income tax on Reservation earned income, and have no power to enforce any state or county laws and regulations either civilly or criminally against Tribal Indians on the Reservation.

Apache County is governed by three supervisors, one elected from each supervisorial district. There are, of course, other county officers elected at large such as a County Sheriff, a County Treasurer and a County Assessor. For many years two of the County supervisorial districts have been located entirely off the Reservation and a third supervisorial district encompassed all of the Navajo

Indian Reservation and a portion of the land off the Reservation. In the past only the non-Indians have been counted in apportionment of the supervisorial districts.

On October 15, 1973 certain Navajo Tribal Indians, who are some of the appellees herein, instituted an action against Apache County and its Board of Supervisors, as individuals and in their official capacity, claiming violation of the civil and constitutional rights of these Indians because of alleged malapportionment of the supervisorial districts.

The county officers who are appellants herein are, with the exception of Tom Shirley, residents and taxpayers within the county and are subject to all county and state laws. These county officers, in their official capacity and, with the exception of Tom Shirley, as individuals answered the complaint and counterclaimed contending that federal and state statutes which the Plaintiff construed as allowing Navajo Reservation Indians to vote in Apache County elections and be counted for purposes of reapportionment were unconstitutional and that their enforcement, operation and execution should be enjoined. Consequently a three judge statutory court was convened pursuant to 28 U.S.C. §§ 2281 and 2282.

On January 23, 1974 the United States of America filed a second suit in the United States District Court for Arizona against essentially the same Defendants alleging similar violations of Indian rights. Because of the similarity of the parties and the issues, the case was ordered consolidated with the prior suit and the Defendants raised the same contentions expressed in the earlier suit in answer to the second suit.

It was conceded by the Defendants in the lower court that if Navajo Tribal Indians are entitled to vote and to be weighed equally in the population count for purposes of

apportionment, a reapportionment of supervisorial districts would have to occur. Such a reapportionment would place two and perhaps part of the third supervisorial district entirely upon the Reservation by virtue of agreed population figures.

However, the Defendants contended that 8 U.S.C. § 1401 (a) (2) and A.R.S. § 16-101 were unconstitutional in that Navajo Tribal Indians cannot constitutionally be permitted to vote in Apache County elections or be considered as part of the population for apportionment of the supervisorial districts for several separate and distinct reasons: (1) The Tribal Indians are not citizens of the United States or of Arizona. (2) The Tribal Indians are not residents of Arizona. (3) Even if the court somehow concluded that the Tribal Indians were citizens of the United States and citizens or residents of Arizona, they nevertheless could not participate in and control a government to which they owe no allegiance and pay no taxes as this would violate the constitutional and civil rights of the minority of non-Indians in Apache County under the 5th and 14th Amendments to the United States Constitution and under Section 1981 of the Civil Rights Act. (4) Since Apache County election laws do not apply upon the Reservation and could not, in any event, be legally enforced against Tribal Indians on the Reservation, their exercise of the franchise in Apache County elections violates the non-Indian rights under the 14th and 15th Amendments to the Constitution.

The Defendants and the Plaintiffs below all filed Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Defendants' motion sought to enjoin the operation, enforcement and effect of 8 U.S.C. § 1401(a) (2) and A.R.S. § 16-101 et seq. to the extent they were construed to allow Navajo Tribal Indians to vote in

Apache County elections for the reasons previously stated. The Plaintiffs sought to enjoin the alleged malapportionment of the supervisorial districts and have a reapportionment ordered.

On September 16, 1975 the District Court of Arizona entered its Opinion granting the Plantiffs' Motions for Summary Judgment and denying the Defendants' Motion. A Motion for Rehearing was filed on September 25, 1975. On February 19, 1976 the court entered an Order denying the Motion for Rehearing as well as an Order Implementing the September 16th Opinion, presumably pursuant to Rule 58 of the Federal Rules of Civil Procedure. Paragraphs 3 and 4 of the Order were amended *nunc pro tunc* in a supplemental post-trial order dated March 22, 1976.

The court's February 19, 1976 Order states at the outset:

> "On September 16, 1975, this court, sitting as a three judge court pursuant to 28 U.S.C. §§ 2281, 2282, and 2284 issued its opinion and judgment in the consolidated cases captioned above."

Therefore, a Notice of Appeal to this court was filed on March 4, 1976 pursuant to 28 U.S.C. § 1253.

THE QUESTIONS SUBMITTED ARE SUBSTANTIAL

I. Introduction

Appellants submit that the questions presented by this appeal are substantial and require plenary consideration for their proper resolution. The ruling of the Federal District Court permits a group of persons who are not subject to the government of Apache County and who owe no allegiance to that government to nevertheless rule over a minority of persons who are subject to that government. The action of the lower court is absolutely contrary to the

most fundamental principal of democratic government that those who run the government must be subject to the government.

The Minnesota Supreme Court in *Opsahl v. Johnson,* 138 Minn. 42, 163 N.W. 988, 998 (1917) in discussing the right of Tribal Indians to vote stated:

> "It cannot for a moment be considered that the framers of the Constitution intended to grant the right of sufferage to persons who were under no obligation to obey the laws enacted as a result of such grant. Or, in other words, that those who did not come within the operation of the laws of the state, nevertheless have the power to make and impose laws upon others. The idea is repugnant to our form of government. No one should participate in the making of laws which they need not obey."

Although later overruled, the Arizona Supreme Court in *Porter v. Hall,* 34 Ariz. 308, 322, 271 P. 411 (1928) said of the Indian right to vote in Arizona elections:

> "It is almost unheard of in a democracy that those who make the laws need not obey them."

The ubiquitous jurisdictional restrictions upon state and local control over Navajo Tribal Indians and their Reservation creates five separate and distinct grounds for holding that these Tribal Indians cannot constitutionally exercise the franchise in Apache County elections. With the exception of *Elk v. Wilkins, supra,* the United States Supreme Court has not previously considered any of the questions presented in this appeal.

II. The 14th Amendment to the United States Constitution foreclosed Tribal Indians from National and State Citizenship; 8 U.S.C. § 1401 (a) (2) Is Therefore an Unconstitutional Attempt to Confer Citizenship Upon Tribal Indians Because It Did Not Grant the States Jurisdiction over Those Indians.

The 14th Amendment to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States *and subject to the jurisdiction thereof are citizens* of the United States and of the State wherein they reside..."
>
> Section 2. Representatives shall be apportioned among the several States according to their respective number, counting the whole number of persons in each State, *excluding Indians not taxed."* (emphasis supplied).

In only one case has the United State Supreme Court considered the language of the 14th Amendment as it relates to the citizenship of Reservation Indians. In that case, *Elk v. Wilkins,* 112 U.S. 94 (1884), the Supreme Court held that a Tribal Reservation Indian was not a citizen of the United States or any State because they were not "completely subject to their political jurisdiction and owing direct and immediate allegiance", (28 L.Ed. at 646), and because they are not taxed. The court stated:

> "But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation in which all other persons are now included, is wholly inconsistent with their being considered citizens." (28 L. Ed. at 646).

It is inconceivable that Reservation Indians cannot be counted for apportionment purposes in congressional districts and yet can be counted for apportionment purposes

in Apache County supervisorial districts. *Elk v. Wilkins* has never been overruled or distinguished on its holding concerning citizenship. Consequently, the lower court ruling in this case is diametrically opposed to the United States Supreme Court decision in *Elk v. Wilkins*.

In 1924 Congress sought to make Tribal Indians citizens by the enactment of 8 U.S.C. § 1401 which provides in pertinent part:

> "(a) The following shall be nationals and citizens of the United States at birth:
>
> (1) A person born in the United States, and subject to the jurisdiction thereof,
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe . . ."

However, in passing the law Congress failed to consider the import of either the 14th Amendment as quoted above or the Supreme Court's interpretation of the 14th Amendment in *Elk v. Wilkins*. Had the Congress also provided that the Tribal Indians would become subject to the jurisdiction and taxing powers of the governmental entities to the same extent as other citizens, the statute would have lawfully accomplished its purpose. However, the statute, as interpreted by subsequent court rulings, apparently only conferred the rights of citizenship upon Tribal Indians without the commensurate responsibilities of citizenship such as subjection to the jurisdictional and taxing powers of the state and local governments.

There is no question that the powers of Apache County and the State of Arizona over the Navajo Reservation Indians are almost nonexistent. *United States v. Kagama,* 118 U.S. 375 (1886) (Tribal Indians held to have no allegiance to the state); *Williams v. Lee,* 358 U.S. 217 (1959) (Arizona lacks civil jurisdiction over acts by Indians on the Reservation); *McClanahan v. State Tax Commission,* 411 U.S. 164 (1973) (Arizona cannot tax income earned by Indians on the Reservation); *Commissioner of Taxation v. Brun,* 174 N.W.2d 120 (Minn. 1970) (Process cannot be served by a Sheriff on the Reservation); *Williams v. Lee,* 358 U.S. 217 (1959) (Arizona has no criminal jurisdiction over Indians on the Reservation).

The phrase "Indians not taxed" in the 14th Amendment must refer to the power of the state to tax since state taxes, principally state property taxes, and not federal income taxes were the types of taxes existing when the 14th Amendment was enacted. In what is probably the most scholarly study ever undertaken concerning citizenship status of Indians, the author remarks:

> "Thus, 'Indians not taxed', 'Indians not subject to the jurisdiction' of a state, and 'Indian Tribes' are synonymous." *Note, Sovereignty, Citizenship and the Indian,* 15 ARIZ. L. REV. 973, 983 (1973).

Many courts have recognized that when an Indian becomes a citizen, he thereby becomes subject to taxation, state jurisdiction and all the responsibilities of citizenship. *In re Heff,* 197 U.S. 488 (1905); *Ex parte Savage,* 158 F.205 (C.A. Kan. 1908); *United States v. Hester,* 137 F.2d 145 (10th Cir. 1943); *State v. Morrin,* 136 Wisc. 552, 117 N.W. 1006 (1908); *State v. McAlhaney,* 220 N.C. 387, 17 S.E.2d 352 (1941); *Colbert v. Roadhouse,* 279 P.2d 349 (Okla. 1955).

The United States Supreme Court in *Laria v. United States,* 231 U.S. 9, 22 (1913) stated:

> "Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society.

> These are reciprocal obligations, one being compensation for the other."

Similarly, this court stated in *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 345 (1954) that:

> "Since the 14th Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally recognized reciprocal duties of protection by the state *and of allegiance and support by the citizen.* The latter obviously includes a duty to pay taxes, and their nature and measure is largely a political matter." (emphasis supplied).

The question of Navajo Tribal citizenship becomes much more than an academic exercise when those alleged Indian "citizens" are permitted to govern a minority of non-Indians in the county when the Indian "citizens" are not subject to the laws and taxes which they shall impose upon the non-Indian minority. This unique and dangerous principal which has been approved by the district court demands the thorough and closest scrutiny of the United States Supreme Court.

III. The Navajo Tribal Indian Is Not a Resident of Arizona and Is Therefore Not Entitled to Vote in Apache County Elections Under A.R.S. § 16-101.

Section 20 of the Arizona Enabling Act provides:

> "That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian Tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; . . ."

The Navajo Treaty of 1868 states in Article 9 that:

> "In consideration of the advantages and benefits conferred by this Treaty, and the many pledges of friendship by the United States, the Tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their Reservation, as herein defined, but retain the right to hunt on any unoccupied land contiguous to their Reservation, so long as the large game may range thereon in such numbers as to justify the chase; . . ."

Article 13 of the Treaty also states:

> "And it is further agreed and understood by the parties to this Treaty, that if any Navajo Indian or Indians shall leave the Reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges and annuities conferred by the terms of this Treaty; . . ."

The Enabling Act and the 1868 Treaty make it difficult to conceive that the Navajo Tribal Indian can be a resident of Arizona, but court pronouncements which have limited almost every form of jurisdiction over the Tribal Indian leaves no doubt that he cannot be a resident of Arizona. Process cannot even be served on an Indian while he is on the Reservation since the Sheriff has no jurisdiction thereon. *Langford v. Monteith,* 102 U.S. 145, 147 (1880); *Annis v. Dewey County Bank,* 335 F.Supp. 133 (D.S.C. 1971); *Martin v. Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972); *County of Beltrami v. County of Hennepin,* 264 Minn. 406, 119 N.W.2d 25, (1963). It is highly doubtful that civil jurisdiction could even be obtained

through the long arm statutes or that a Navajo Tribal Indian could be extradited on a criminal matter. But even if these were methods of obtaining personal jurisdiction over Tribal Indians, they only emphasize the point that the Navajo Tribal Indian is not a resident of Arizona. Obviously, a state does not extradite its own residents present within the state, and the long arm statute cannot be utilized to obtain service over one who is a resident within the state.

The Arizona Supreme Court has held that:

> "Proceedings in the Navajo Tribal Court must be treated the same as proceedings in a court of *another state or foreign country*, . . ." *In re Lynch's estate,* 92 Ariz. 354, 357, 377 P.2d 199 (1962) (emphasis supplied).

See *Morgan v. Colorado River Indian Tribe,* 103 Ariz. 425, 428, 433 P.2d 421 (1968) (fn. 1). The United States Supreme Court in *United States v. Kagama,* 118 U.S. 375, 383 (1868) stated:

> "These Indian Tribes are the wards of the nation. . . . *they owe no allegiance to the states,* and receive from them no protection." (emphasis supplied).

Why does Arizona, like all other states, require residency as a qualification for one to vote and hold public office? Obviously, it is to assure that persons who vote and consequently who may hold public office have a valid interest in the government which they propose to control and to assure that they are subject to the criminal and civil processes of that jurisdiction in order to assure that their behavior as voters and their behavior in public office conforms to the laws of that government. See *State v. Van Beek,* 87 Iowa 569, 54 N.W. 525 (1893).

Certainly, a person who exists totally beyond the control of the state government even to the point of the state

government being unable to enforce its elections laws against that individual (see Section VI *infra*) cannot be a resident of the state for purposes of voting in the elections of that state. To allow a Tribal Indian to control that government which has abolutely no control over the Tribal Indian defies all credulity. This court has not previously examined the serious consequences of a Tribal Indian's participation in and control of a government when that government has no reciprocal power or control over the Tribal Indian.

IV. The Constitutional Rights of the Non-Indian Appellants to Due Process of Law and Equal Protection of the Law Will Be Seriously Infringed Upon if Navajo Tribal Indians Are Permitted to Participate in and Thereby Control the Government of Apache County.

Even if the Navajo Tribal Indian were deemed to be a citizen of the United States and a resident of Arizona, he still may not constitutionally govern through the exercise of the franchise in a government to which he is not subject. The constitutional violations are manifest for several reasons.

A. SEVENTY-FIVE PERCENT OF THE POPULATION OF THE COUNTY WILL IMPOSE TAXES UPON A MINORITY OF TWENTY-FIVE PERCENT WHO ARE SUBJECT TO THE TAX.

Seventy-five percent of the population of Apache County are Navajo Tribal Indians who, *even though they may be substantial property owners,* are nevertheless, by declaration of congress and the supreme court, immune from the county property tax which is imposed upon the twenty-five percent minority of non-Indians in the county.

The non-taxpaying Indians can thereby tax and destroy the businesses, homes and property interests of the non-Indians in the county by imposing excessive taxation.

This constitutes a taking of property without due process of law. Taxation without representation, or without the consent in some form of those who are to be taxed, is a vicious principal contrary to democratic government. The Supreme Court of Michigan stated:

> "The only security against an abuse of power being found in the structure of government itself *is that in imposing a tax the legislature acts upon its constituents." C.F. Smith Co. v. Fitzgerald,* 279 Mich. 659, 259 N.W. 352, 356 (1935) (emphasis supplied).

The Navajo Indian Board of Supervisors in Apache County in this case, will not impose the tax upon their constituents—the Tribal Indian population which is 75% of the population of the county. Thus, there is no security against the abuse of the taxing power.

The courts and congress have determined the Tribal Indian must be immune from taxes because he is financially non-competent or incompetent to govern his own economic affairs. This is why the Bureau of Indian Affairs was established. *Squire v. Capoeman,* 351 U.S. 1, 10 (1956); *Freeman T. Walker,* 37 T.C. 962, 971 (1962). Under what system of logic can the Navajo govern Apache County, impose taxes on its residents and spend those taxes when he cannot govern his own property or survive taxation himself. The irony boggles the mind.

Patrick Henry in the Stamp Act Resolution of May 29, 1765 stated:

> "The taxation of the people by themselves or by persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, and the easiest mode of raising them, and are equally affected by such taxes themselves, is the distinguishing characteristic of British freedom and without which, the ancient constitution cannot subsist." R.D.

> Meade, Patrick Henry: Patriot in the Making 170 (1957).

The inequity of taxation without representation and representation without taxation also constitutes a deprivation of equal protection of the law. If indeed the Tribal Indian is a citizen and resident of Arizona then there is no conceivable justification for permitting him to avoid taxes on his property and yet be given the right and power to impose that same tax upon similar property owned by a non-Indian. Such a distinction is founded entirely upon race because even the non-Indians who live on the Reservation must pay the tax. The classification is constitutionally suspect. *McLaughlin v. Florida,* 379 U.S. 184 (1964).

B. THE CONSTITUTIONAL RIGHTS OF THE NON-INDIAN APPELLANTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW ARE VIOLATED IF INDIANS ARE PERMITTED TO VOTE IN COUNTY ELECTIONS WHILE THE STATE COURTS LACK JURISDICTION OVER THE TRIBAL INDIAN AND THE STATE LAWS ARE DEEMED INAPPLICABLE ON THE RESERVATION.

> "[S]tate laws generally are not applicable to Tribal Indians on an Indian Reservation except where congress has expressly provided the state laws shall apply." Cohen, Federal Indian Law 845 (1958).

Furthermore, it is axiomatic that the states cannot serve either criminal or civil process upon Reservation Indians while they are located on the Reservation and that the Indian cannot be criminally or civilly prosecuted for acts occurring on the Reservation. (cases cited at 11 *supra*). If seventy-five percent of the county's population consists of Navajo Indians it is reasonable to assume that Navajos will be elected to county offices and it is a *certainty* that they will be elected to two of the three supervisorial seats if the tribal Indian is to be weighted equally with the non-Indian in supervisorial apportionment.

What then is the remedy to control the malfeasance or nonfeasance of these Tribal Indians in public office? The state court would not have jurisdiction over many felonies which the Navajo Tribal officer might commit such as embezzlement of public funds, election fraud, extortion, forgery, and crimes involving narcotics. While A.R.S. § 38-291(8) would require removal of the Tribal Indian from office in the commission of these crimes, jurisdiction could not be obtained over either his person or the subject matter in order to remove him from office. The courts have neither personal nor subject matter jurisdiction to punish the Indians for any misdemeanors committed in office if the act occurred on the Reservation or if the Navajo remained at his home on the Reservation.

Most civil remedies against such officers would also be non-existent. The county would have no control over personal property, such as road equipment, sent onto the Reservation and would lack jurisdiction over buildings and structures placed upon the Reservation by a Navajo Board of Supervisors.

The appellants have no process by which they can assure that the property of the taxpayer is secure from waste, mismanagement and mis-appropriation of tax funds and taxpayers property. The lack of any process to secure such property and monies obviously constitutes a violation of due process.

The non-Indian appellants, however, are subject to all of these criminal and civil penalties and regulations while they hold office. If the Tribal Indian office holders are not subject to these same controls, then the non-Indian appellants are denied equal protection of the law. Again, imposing these sanctions upon non-Indian office holders while Tribal Indian office holders are immune from these crim-

inal and civil sanctions is a distinction based entirely upon race and is constitutionally suspect. *McLaughlin v. Florida,* 379 U. S. 184 (1964).

V. The Civil Rights of the Non-Indian Appellants Under 42 U.S.C. § 1981 Will Be Violated if the Navajos Are Entitled to Vote in Apache County Elections.

42 U.S.C. § 1981 of the Civil Rights Act provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, to be parties, to give evidence, and to full and equal benefit of the laws and proceedings for the securities of persons and property as enjoyed by white citizens, *and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other.*" (emphasis supplied).

The protection of this statute obviously extends to the Anglos, the Negros and the Mexicans in Apache County if their civil rights are violated. *Central Presbyterian Church v. Black Liberation Front,* 303 F.Supp. 894 (D.Mo. 1969). The Navajo Tribal Indians are not subject to the same punishment, pains, penalties, taxes and licenses as are the other residents of Apache County. This distinction based on race is certainly constitutionally suspect. *McLaughlin v. Florida,* 379 U. S. 184 (1964); *Graham v. Richardson,* 403 U. S. 365 (1971).

However, the unconstitutionality is seriously compounded when those Tribal Indians who are not subject to the laws and taxes of the State of Arizona and Apache County are permitted to make those laws and impose those taxes upon the minority of the population of the county which is subject to the laws and taxes.

Our courts in the civil rights cases have frequently been faced with the constitutionality of applying different *rights* to certain citizens. However, seldom if ever has the question of the constitutionality of imposing different *responsibilities* upon different citizens been examined under 42 U.S.C. § 1981. This is because no race in this country, except for the Indian, has ever been granted immunity from *responsibilities* imposed by law. However, the Supreme Court of New Jersey in *Washington Nat. Ins. Co. v. Bd. of Review*, 64 A.2d 443, 447 (N.J. 1949) stated:

> "The equal protection of the laws means that no person or class of person shall be denied the protection of the laws enjoyed by other persons or classes of persons under similar conditions and circumstances, in their lives, liberty, property and in the pursuit of happiness, *both as respects priveleges conferred and burdens imposed. . . . This includes equality of exemption from liabilities.* (citations omitted) (emphasis supplied).

The non-Indian appellant Board of Supervisors members in this case are subject to all of the punishment, pains, penalties and taxes placed upon public officers generally in the State of Arizona. They are also subject individually to the taxes they impose as members of the Board of Supervisors. On the other hand the ruling of the lower court will permit Navajos to vote and hold office with almost total immunity from these same punishments, pains, penalties and taxes that the non-Indian appellant is subject to. We cannot conceive of a more obvious violation of the Civil Rights Act.

VI. The 14th Amendment Equal Protection and Due Process Clauses as Well as the 15th Amendment Would Prohibit Navajos from Voting in Apache County Elections Where the Arizona Election Laws Have No Application on the Reservation and Would, In Any Event, Be Civilly and Criminally Unenforceable Against Navajo Tribal Indians.

The United States Congress has never enacted legislation to make Arizona election laws applicable on the Reservation; nor has Congress attempted to make the Arizona civil and criminal statutes for enforcing the election laws applicable to Tribal Indians on the Reservation. Therefore, it is clear that neither the election laws nor their enforcement provisions apply on the Reservation or to Reservation Indians. COHEN, FEDERAL INDIAN LAW 845 (1958).

Consequently, there is no due process by which the appellants can legally carry out elections on the Reservation. In any event, there is no due process by which they could enforce criminal and civil process and penalties against Indians who would violate election laws on the Reservation even if those laws were applicable. A fair and honest election cannot be insured.

While the lower court has stated that the Navajo Tribal Indians may vote within supervisorial districts located entirely upon the Reservation, the Arizona voting laws which apply off the Reservation will not apply to those Tribal Indians voting on the Reservation. This constitutes a clear violation of the equal protection of the laws.

Finally, under the 15th Amendment to the United States Constitution, the vote of the appellants and other Anglos, Negros and Mexicans have no sanctity because the Tribal Indians could vote tombstones, Indians from New Mexico and Utah which adjoin Apache County or engage in almost every conceivable violation of election law to the detriment of the vote of those off the Reservation. This is certainly a

denial and abridgment of the right of non-Indians in Apache County to vote. Again, the distinction is based entirely upon race.

This point was recognized by the Minnesota Supreme Court in *Opsahl v. Johnson,* 138 Minn. 42, 163 N.W. 988, 990 (1917) wherein the court stated:

> "To emphasize this situation, we merely need to call attention to the fact that no matter in what respect Tribal Indians, not citizens, would violate elections laws, they could not be punished provided the acts were committed on the Reservation."

The election of a Navajo could not even be contested under Arizona law if the Navajo chose to stay on the Reservation for twenty days after the canvass and declaration of result since A.R.S. § 16-1205 requires the officer to be served with a Summons and Complaint and the case actually tried within *twenty days* after the canvass and declaration of result. Also, the Sheriff could not serve subpoenas on the Navajos to testify in cases concerning election irregularities occurring on the Reservation.

We cannot conceive of a greater violation of due process than a system where there is no process to enforce and control the very basis of the democracy—the voting laws. Elections will be a farce.

VII. If the Navajo Tribal Indian Has Any Constitutional Right Relative to Voting in Apache County Elections, a Balancing of Constitutional Rights Weighs in Favor of Their Not Being Permitted to Vote.

For the reasons heretofore stated appellants contend that the Tribal Indian has no right to vote in Apache County elections. But even if this court determined that the Navajo Tribal Indian was vested with some semblance of right, they do not possess the requisite interest in county elections

to sanction a violation of the appellants' constitutional rights. This case is clearly distinguishable from *Kramer v. Union Free School District,* 395 U.S. 621 (1969), *Cipriano v. Houma,* 395 U. S. 701 (1969) and *City of Phoenix v. Kolodeziejski,* 399 U. S. 204 (1970). In those cases the court found the persons sought to be excluded from exericsing the franchise as substantially affected or directly interested in the matter voted upon.

In Apache County, however, the Navajo Tribal Indians are almost totally unaffected by any of the governmental process of Apache County. They do not pay any of the taxes imposed by the county even though they may in fact own property that would normally be subject to county taxes if they were not Indians. Practically all county and state laws and regulations have no application to the Tribal Indian. The Tribal Indian is not subject to the jurisdiction of the courts of Apache County. The Tribal Indians have been classified as a nation within a nation, a dependent nation and a soverign entity.

In *Evans v. Cornman,* 398 U.S. 419 (1970) the court stated:

> "Moreover the right to vote, as the citizen's link *to his laws and government,* is protective of all fundamental rights and privileges." (398 U.S. at 422) (emphasis supplied).

Clearly the laws and government of Arizona and Apache County are not the Tribal Indians' laws and government—they are not the laws and government of the Navajo Nation. The laws of Apache County can have no force within their nation. In *Evans,* the court also stated that the federal enclave residents whose right to vote was questioned in the case were subject to process and jurisdiction of the state

courts. This is entirely untrue in the case of the Navajo Tribal Indian.

To conclude that the Navajos have a substantial interest in the government of Apache County is to pervert the meaning of the words. The Navajo Reservation is financed almost entirely from Navajo Tribal funds and federal government monies, neither of which flow through or into the government of Apache County. It is clear that the Navajos do not have a sufficient interest in Apache County government to be allowed to vote and thereby control that government to which they owe no allegiance. On the other hand, there is no more compelling state interest than for government to assure that only those persons who are subject to the government may rule over the people within that government.

In the reapportionment case of *Avery v. Midland County*, 390 U.S. 474, 484 and 485 (1968) the Supreme Court stated:

> "We hold today only that the constitution permits no substantial variation from equal population in drawing districts for units of local government *having general governmental powers over the entire geographic area served by the body.*" (emphasis supplied).

Without any doubt this local government of Apache County has no general governmental power over the entire geographic area served by the body. It has no power over ½ of the land area of Apache County or ¾ of its people. Surely, then, they shall not be considered as a part of the basis for apportionment of supervisorial districts.

VIII. Conclusion

This court is faced with the question of whether one who is unwilling to be subservient to the law can nevertheless make the law. Can the Tribal Indian inflict the pains and responsibilities of citizenship on non-Indians while he himself is immune from those pains and responsibilities? These constitutional issues affect thousands of non-Indians living in the vicinity of Reservations. The questions are substantial and require full briefing and argument before this court.

Respectfully submitted this 15th day of April, 1976.

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CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, which lists the persons served with copies of this Jurisdictional Statement and its Appendix, service has been made upon all parties of record.

MITCHEL D. PLATT

Appendix A

In the United States District Court
for the District of Arizona

Filed September 16, 1975

Leslie E. Goodluck, et al., Plantiffs, vs. Apache County, et al., Defendants.	CIV. 73-626 PCT (WEC)
United States of America, Plantiff, vs. State of Arizona, et al., Defendants.	CIV. 74-50 PCT (WEC)

OPINION AND JUDGMENT

Before TRASK, Circuit Judge, and CRAIG and COPPLE, District Judges

CRAIG, District Judge

The above entitled causes of action were consolidated for hearing cross motions for summary judgment before a three-judge court.

Plaintiffs in both actions seek injunctive relief and in Cause No. Civ. 73-626, plaintiffs also seek declaratory relief.

This court has jurisdiction pursuant to Title 28, U.S.C. §§ 2281 and 2282. This court has subject matter jurisdiction, pursuant to Title 28, U.S.C. §§ 1343, 1345, 2201 and Title 42 U.S.C. §§ 1971(d), 1971(j)(F), 1981, and 1983.

Apache County is a political and geographical subdivision of the state of Arizona. It is governed by a Board of Supervisors, which exercises general governmental authority in the county, including the authority to define the territorial limits of supervisorial districts within the county. There have been established by appropriate action, three

supervisorial districts. Each district is represented by one supervisor, who exercises one vote. The districts are numerically designated as 1, 2, and 3.

The United States census for 1970 discloses the following approximate population distribution among the three districts within the county: District 1, 1,700; District 2, 3,900; District 3, 26,700.

Most of District 3 includes within its boundaries, that portion of the Navajo Indian Reservation, lying within Apache County. Of the total population within District 3, 23,600 are Indian. Of the total population within District 2, 300 are Indian. Of the total population of District 1, 70 are Indian.

Very little property taxable by Apache County is owned by Indians or is owned by the Navajo tribe.

Plaintiffs assert:

1. The apportionment described herein constitutes a denial of equal protection of the laws of the state of Arizona and the Fourteenth Amendment to the Constitution of the United States and is in violation of Title 42, U.S.C. §§ 1981 and 1983.

2. The apportionment described herein constitutes an abridgement or denial of the right to vote on account of race or color in violation of the Fifteenth Amendment to the Constitution of the United States and is in violation of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

3. The apportionment described herein constitutes a distinction by race in the exercise of the Right to Vote in violation of 42 U.S.C. § 1971(a)(1).

4. The apportionment described herein constitutes a racially discriminatory application of the voting laws of Arizona in violation of 42 U.S.C. § 1971(a)(2)A.

Defendants assert:

1. 8 U.S.C. § 1401(a)(2) is an unconstitutional attempt to make reservation Indians citizens of the United States.

2. The immunity from taxes bars Indians from the right to vote under the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. By way of counterclaim, defendants assert the Indians are not citizens under the Constitution and laws of the United States entitling them to vote.

Defendants raise other issues not pertinent to the disposition of these cases.

The primary issue which would appear to be dispositive of the cases before us is whether 8 U.S.C. § 1401(a)(2) is constitutional.

8 U.S.C. § 1401 provides:

> "(a) The following shall be nationals and citizens of the United States at birth:
>
> (1) a person born in the United States, and subject to the jurisdiction thereof;
>
> (2) a person born in the United States to a member of an Indian, Eskimo Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property: ***"

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside.*" (Emphasis supplied).

In the *Slaughter House Cases,* 16 Wall. 36 (1873), both the majority and dissenting opinions recognized the derivative nature of the right to state citizenship. It was most aptly stated by Mr. Justice Bradley in his dissenting opinion: "The question is now settled by the Fourteenth Amendment itself, that citizenship of the United States is the primary citizenship in this country, and that state

citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons." *Id.* at 112.

That the Indians here involved are residents of Arizona is of little doubt. *See Harrison v. Laveen,* 67 Ariz. 337; *Shirley v. Superior Court,* 109 Ariz. 510.

The basis of defendants' argument is primarily founded on the case of *Elk v. Wilkins,* 112 U.S. 94 (1884), wherein the court analyzed §§ 1 and 2 of the Fourteenth Amendment and held that a reservation Indian is not a citizen of the United States. *Elk* was an action filed by an emancipated Indian against the registrar of one of the wards of the city of Omaha for refusing to register him as a qualified voter.

The court first held that the clause "subject to the jurisdiction thereof" found in the first paragraph of the Fourteenth Amendment meant completely subject to the jurisdiction and owing direct and immediate allegiance. The court then found that Indians born within the territorial limits of the United States owed immediate allegiance to their tribe first. The court supported this conclusion by looking at the second section of the Fourteenth Amendment which states "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, *excluding Indians not taxed.*" (Emphasis added). This absolute exclusion from the basis of representation was found to be wholly inconsistent with the concept of citizenship. *Id.* at 102.

Defendants contend that under *Elk* the reservation Indian is not a citizen because at the time of the passage of 8 U.S.C. § 1401 the reservation was still not subject to

the jurisdiction of the United States and that they were still not taxed by the states.

In 8 U.S.C. § 1401, the words "subject to the jurisdiction thereof" are not found in subsection (a)(2) as it is in (a)(1).

Defendants argue that as a result of this omission, Indians need not be subject to the jurisdiction of the United States. The Fourteenth Amendment provides for only two ways of becoming a citizen, birth or naturalization, and in both cases the person being made a citizen must be subject to the jurisditcion of the United States.

The *Slaughter House Cases,* supra, made it clear that this clause did refer only to the jurisdiction of the United States and did not require subjection to the jurisdiction of a state. 16 Wall. at 73-74.

A more recent Supreme Court decision has analyzed the clause under consideration and after mentioning *Elk,* concluded that the clause is equivalent of the words "within the limits and under the jurisdiction of the United States". *U.S. v. Wong Kim Ark,* 169 U.S. 649, 687 (1898). The court reasoned in that case that this interpretation was correct due to a change in wording which was implemented when the Civil Rights Act of 1866 was reenacted as the Fourteenth Amendment. The wording was changed from "not subject to any foreign power" to the curent wording. By statutory proclamation, it is clear that Congress at the time of *Elk* and *Wong Kim Ark* did not regard the Indian tribes as foreign powers. 16 Stat. 566 provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty ***" 25 U.S.C. § 71 (1871).

The issue here is not so much whether the enactment of 8 U.S.C. § 1401 by the Congress was wise or good public

policy, but rather whether Congress had the constitutional authority to so legislate. *See U.S. v. Rogers,* 4 How. 567 at 572.

When a party is subject to the plenary power of another party, that first party is subject to the jurisdiction (complete and immediate) of the second party. Congress' power over the Indian tribes is plenary. *Worcester v. Georgia,* 6 Pet. 515 (1834); *McClanaghan v. Arizona State Tax Comm.,* 411 U.S. 164 (1973). *See also, Morton v. Mancari,* 94 S.Ct. 2474 (1974).

The phrase "not taxed" as used in the second section of the Fourteenth Amendment is an historical anomoly which is of no relevance today. From an historical viewpoint, it is clear that this phrase was synonymous with the granting of citizenship. Inferring from the wording of the Amendment, one can presume that an Indian who was taxed was eligible to be counted for representation purposes. Therefore, taxation was the equivalent to being considered a citizen.

Nowhere does the Constitution define the requirements necessary for citizenship. *See Wong Kim Ark,* supra at 459. The granting of citizenship by Congress in 8 U.S.C. § 1401 recognizes that the Indian now is subject to federal jurisdiction and many federal taxes. It is much too strict a reading of the Constitution to require subjection to state taxes before the citizenship may be granted.

The court in *Elk* recognized the trend of national legislation toward the education and civilization of the Indians in an attempt to prepare them for citizenship. *Elk, supra* at 106-107. The court further recognized that it would take an act of Congress to implement this goal. *Id.* at 103. The Congress did just this when it enacted 8 U.S.C. § 1401 (a)(2).

Since Congress did act constitutionally in granting citizenship to the reservation Indians, and since, under the Fourteenth Amendment, the Indians are also citizens of Arizona, and since the Arizona Constitution allows the Indians to vote, the defendants' equal protection and due process arguments appear to be premature for adjudication.

Defendants assert that due to the Indian Civil Rights Act, 25 U.S.C. § 1322(a), the state may assume jurisdiction over the Indian tribes only if the tribe consents. Defendants contend that due to their preferred status, the Indians would never consent.

Defendants ignore the fact that the State of Arizona could have unilaterally assumed jurisdiction over the tribe at any time between 1953 and 1968 at which time the act was passed. 67 Stat. 590 (1953) granted the states authority to assume jurisdiction even though the state's enabling statute was to the contrary. The court in *Williams v. Lee,* 358 U.S. 217 (1959), was probably correct when the court assumed that the people of Arizona concluded that the burdens accompanying this assumption might be considerable. *Id.* at pp. 222-23.

From the record presently before us, it is clear that a malapportionment of supervisorial districts is present. It therefore appears that Apache County Arizona must be redistricted so that the apportionment may conform to the standards dictated in *Baker v. Carr,* 369 U.S. 186 (1962); and *Avery v. Midland County,* 390 U.S. 474 (1968).

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED that the plaintiffs' Motions for Summary Judgment are granted and the defendants' Motions are denied.

DATED this 30th day of June, 1975.

JUDGE TRASK, Circuit Judge
JUDGE CRAIG, District Judge
JUDGE COPPLE, Circuit Judge

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In the United States District Court for the District of Arizona

Filed February 19, 1976

Leslie E. Goodluck, et al., Plaintiffs, vs. Apache County et al., Defendants.	CIV No. 73-626-PCT-WEC
United States of America, Plaintiff, vs. State of Arizona, et al., Defendants.	74-50-PCT-WEC

ORDER

The Court has considered the defendants' motion for a rehearing, memorandum in support thereof, and response of the plaintiffs in the consolidated cases captioned above.

It is hereby ORDERED that the defendants motion for a rehearing is denied.

Dated: 19 February 1976

Judge Trask, Circuit Judge
Judge Craig, District Judge
Judge Copple, District Judge

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Roger A. Schwartz
Attorneys
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Department of Justice
Washington, D. C. 20530

In the United States District Court for the District of Arizona

Filed February 19, 1976

Leslie E. Goodluck, et al., Plaintiffs, v. Apache County, et al., Defendants.	CIV 73-626 PCT (WEC)
United States of America, Plaintiff, v. State of Arizona, et al., Defendants.	CIV. 74-50 PCT (WEC)

ORDER

On September 16, 1975, this Court, sitting as a three judge court pursuant to 28 U.S.C. §§ 2281, 2282, and 2284, issued its Opinion and Judgment in the consolidated cases captioned above. For the reasons stated therein;

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The plaintiffs' motions for summary judgment are granted. The defendants' motions for summary judgment, counterclaims against the plaintiffs, and all other claims against the plaintiffs are denied;

2. The defendants, Apache County and the individual members of the Board of Supervisors, shall adopt a plan for reapportionment of the County's supervisorial districts which will conform to the standards set out in *Baker v.*

Carr, 369 U.S. 186 (1962); *Avery v. Midland County,* 390 U.S. 474 (1968); the Fourteenth and Fifteenth Amendments to the Constitution of the United States; the Voting Rights Acts of 1965, as amended, 42 U.S.C. § 1973 *et seq.;* and 42 U.S.C. §§ 1971(a)(1) and (a)(2)A;

3. Within forty-five (45) days from the entry of this Order, the defendants shall submit the adopted reapportionment plan to the Attorney General of the United States, or to the United States District Court for the District of Columbia, pursuant to the provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

4. Should the Attorney General or the District Court for the District of Columbia determine, pursuant to the provisions of Section 5 of the Voting Rights Acts, that the adopted reapportionment plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, the plan shall be submitted to the District Court for the District of Arizona. The District Court for the District of Arizona shall determine whether the plan complies with the provisions of this Court's Order, Opinion, and Judgment and, if the plan does so comply, the Court shall order its implementation.

5. Upon submission of the defendants' reapportionment plan, the District Court for the District of Arizona shall also consider whether any additional affirmative relief is required to fully implement this Court's Order, Opinion and Judgment.

6. No further issues require a three judge court and, pursuant to 28 U.S.C. §§ 2281, 2282, and 2284, the consolidated cases are remanded to a single judge for such action which is not inconsistent with this Court's Order, Opinion and Judgment.

7. Any party may move the District Court for the District of Arizona to dismiss the consolidated actions at any time following the expiration of eighteen (18) months from the entry of this Order if, at such time, the Court's Order, Opinion and Judgment has been fully implemented. Provided, however, that any other party shall have thirty (30) days in which to respond to the motion to dismiss.

8. The plaintiffs shall recover of the defendants their taxable cost.

9. The District Court for the District of Arizona shall retain jurisdiction of the consolidated cases for all purposes.

Dated this 19th day of February, 1976.

Judge Trask, Circuit Judge
Judge Craig, District Judge
Judge Copple, District Judge

In the United States District Court
for the District of Arizona

Filed March 22, 1976

Leslie E. Goodluck, et al., Plaintiffs, v. Apache County, et al., Defendants.	CIV. 73-626 PCT (WEC)
United States of America, Plaintiff, v. State of Arizona, et al., Defendants.	CIV. 74-50 PCT (WEC)

SUPPLEMENTAL POST-TRIAL ORDER

On September 16, 1975, this Court, sitting as a three judge court pursuant to 28 U.S.C. §§ 2281, 2282, and 2284, issued its Opinion and Judgment in the consolidated cases captioned above. On February 19, 1976, this Court issued an Order implementing the provisions of its Opinion and Judgment of September 16, 1975.

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants' Motion for Injunction or Stay Pending Appeal from Judgment and Order is hereby denied.

2. Paragraphs 3 and 4 of this Court's Order of February 19, 1976, are amended and modified, *nunc pro tunc,* to read as follows:

> "3. On or before April 23, 1976, the defendants shall submit the adopted reapportionment plan to this Court which shall determine whether the plan complies with the standards set forth in paragraph 2 of this Order.
>
> "4. Defendants shall, at the same time they file the plan with this Court, serve copies of the plan upon all other parties in this case, together with the demographic and other statistics upon which the plan is based. The parties shall have twenty (20) days from date of service of the plan to file with this Court any comments, responses, or objections thereto. This Court reserves the authority to adopt defendants' plan as submitted, to alter, amend, or modify defendants' plan, to adopt any plan proposed by any one of the other parties, or to fashion and adopt its own plan."

3. Except as herein above amended and modified *nunc pro tunc,* this Court's Order of February 19, 1976, remains in full force and effect.

DATED this 22nd day of March, 1976.

Judge Trask, Circuit Judge

Judge Craig, District Judge

Judge Copple, District Judge

Appendix B

Filed March 4, 1976

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In the United States District Court for the District of Arizona

United States of America, Plaintiff, vs. State of Arizona; Apache County; and Margaret Lee, Tom Shirley, Larry Stradling, and Arthur N. Lee as Clerk and Members of the Apache County Board of Supervisors, Defendants.	NO. CIV. 74-50-PCT
Leslie E. Goodluck, Kenneth Chee, Steven Ashley, Sr., Stanley E. Ashley, and Anderson Yazzie, Plaintiffs, vs. Apache County; and Margaret Lee, Arthur N. Lee, Larry Stradling, James A. McDonald and Tom Shirley, individually and as Clerk and members of the Apache County Board of Supervisors, Defendants,	NO. CIV. 73-626-PCT

vs.

Edward Levi, as Attorney General of the United States; Raul Castro, as Governor of the State of Arizona; Bruce Babbitt, as Attorney General of Arizona; Virgie Heap, as Apache County Recorder; Lavine Porter and Florence Paisano, in their capacities as Justices of the Peace in Apache County, Additional Defendants on Counterclaim.

NOTICE OF APPEAL

Notice is hereby given that the defendants Apache County, and Margaret Lee, Arthur N. Lee, Larry Stradling, and Tom Shirley as Clerk and members of the Apache County Board of Supervisors respectively and Margaret Lee, Arthur N. Lee, Larry Stradling and James A. McDonald individually, as above named hereby appeal to the Supreme Court of the United States from the 3 judge district court Opinion and Judgment entered September 16, 1975 and subsequent Order denying defendants' Motion for Rehearing and Order Finalizing Judgment filed February 19, 1976 and the whole thereof.

The statutes under which this appeal to the United States Supreme Court is taken are 28 U.S.C. § 1253 and 42 U.S.C. § 1971(g).

Respectfully submitted this 2 day of March, 1976.

PLATT & PLATT
By MITCHEL D. PLATT
Attorneys for Defendants

I hereby certify that a true copy of the foregoing was mailed to all other counsel of record designated below this 2 day of March, 1976.

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Appendix C

8 U.S.C. § 1401:

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided,* That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

(b) Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) of this section shall lose his nationality and citizenship unless—(1) he shall come to the United States and be continuously physically present therein for a

period of not less than two years between the ages of fourteen years and twenty-eight years; or (2) the alien parent is naturalized while the child is under the age of eighteen years and the child begins to reside permanently in the United States while under the age of eighteen years. In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934; *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

(d) Nothing contained in subsection (b) of this section, as amended, shall be construed to alter or affect the citizenship of any person who has come to the United States prior to October 27, 1972, and who, whether before or after October 27, 1972, immediately following such coming complies or shall comply with the physical presence requirements for retention of citizenship specified in subsection (b) of this section prior to its amendment and the repeal of section 1401b of this title.

As amended Oct. 27, 1972, Pub.L. 92-584, §§ 1, 3, 86 Stat. 1289.

A.R.S. § 16-101. Qualifications of registrant

Every resident of the state is qualified to register to vote if he:

1. Is a citizen of the United States.

2. Will be eighteen years or more of age prior to the regular general election next following his registration.

3. Will have been a resident of the state fifty days next preceding the election, except as provided in §§ 16-171 and 16-172.

4. Is able to write his name or make his mark, unless prevented from so doing by physical disability.

5. Has not been convicted of treason or a felony, unless restored to civil rights, is not under guardianship, non compos mentis or insane. As amended Laws 1970, Ch. 151, § 1; Laws 1972, Ch. 146, § 23; Laws 1972, Ch. 218, § 1, eff. May 24, 1972; Laws 1973, Ch. 183, § 7.